ROME AND LAW.

THE student of Roman law and its literature finds his subject referred to in terms of the highest eulogy by eminent writers. If, however, he asks, what precisely did the Romans do to entitle them to the name of the greatest juridical people of antiquity; what, if anything, did the Romans really initiate in the matter of law? he will not easily find a clear and specific answer to the question. In the answer to that question, however, lies the true interest and value of the history of Roman law.

Perhaps it might be thought a sufficient reply to say that the Romans were — as in fact they were — the first to perfect a completed system of private law. I think, however, we may go deeper than that; and shall find that the true and great achievement of the Romans, and what alone enabled them to perfect a completed system, was that they were the first people who ever arrived at a correct conception of private law. Doubtless the Greeks would have anticipated them in this, had the external circumstances of Greek life, and the composition of their law courts, been favorable to the development of a scientific conception and system of law. But, in fact, they were not; and this field of intellectual achievement, at any rate, Greece had to leave for Rome to cultivate.

It is, then, my object in the present article to maintain the following proposition, — that the true interest of the study of the history of Roman law lies in this, that the Romans, through their national practical intelligence, stimulated by external circumstances, and also ultimately by the philosophical theory of a "law of nature" as they conceived it, developed a system of private law which did in fact answer to the true nature of private law, and that they were the first people who did develop such a system. If this be so, then in the history of Roman law we have an important chapter of the history of human development; the history of the growth to maturity of a conception of the utmost value to the welfare of mankind; the history of a great step onward in the growth of the human mind, yet one which has been strangely neglected in professed histories of civilization.

"The true nature of private law" is an expression which certainly demands explanation. By private law is here meant that

portion of the law of a state which deals, directly or indirectly, with the mutual relations and transactions of private individuals *inter se*. By the true nature of private law is meant neither more nor less than the nature which such private law would have if the legislator were perfectly wise. If any justification is demanded for calling this the "true nature" of private law, it is perhaps sufficient to appeal to the view which the common use of language supports, that the most perfect development of anything is a development in accordance with its true nature, and that anything which derogates from the perfection of such development is an infringement upon and interference with its true nature. We need not go deeper and cite in support metaphysical theories of the Stoic, or other philosophies, or appeal to religious beliefs as to the divine ordering of the universe. Not, of course, that it is meant that any one can dogmatically assert what the different rules of private law would be if the legislator were perfectly wise, but only that it is possible to discern very clearly what the general nature of private law would be in such a case.

It is surely clear that, in the first place, its rules and principles would be co-extensive with all the transactions and relations into which men in society enter, permitting, and, so far as necessary, regulating or restraining them, but ignoring none, except such as public policy requires to be deliberately left outside the range of legal cognizance. That is to say, all relations and transactions of mankind which can be wisely dealt with at all by the legislator should be within the purview of the law. In the second place, the law should be as simple and natural as it may be without permitting such a degree of looseness as unduly to facilitate fraud or mistake; — that is to say, law should, so far as is in this sense possible, recognize the natural ways of doing business, and the natural ways of entering into relations, whether business relations or other, — such ways as people spontaneously adopt when not obliged to conform to any express legal requirements. And if these should be the characteristics of private law as properly conceived of, so also as to the methods of its development we may say with confidence that the proper method is by a process of juridical analysis of the transactions and relations of mankind, or, in other words, by the discovery of the true nature of these transactions and relations from a juridical point of view, with the object, that is, of bringing to light the reciprocal rights and obligations between the parties to such transactions and relations in the light of reason, justice,

common sense, and public policy. Private law should consist, in the main,[1] of rules thus elicited for the governance and regulation of such transactions and relations by the tribunals of the country, from which other rules may be deduced by a process of reason and analogy, and thus a completed system of law ultimately built up. Now the Romans were the first people who attained to such a conception of law, as distinguished from systems consisting mainly either of usages and customs, more or less arbitrary or fortuitous and implicated with religious ideas and superstitions, or of regulations imposed at will by the legislator. And so says Sir Henry Maine: "The rigidity of primitive law, arising chiefly from its early association and identification with religion, has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form. . . . I know no reason why the law of the Romans should be superior to the law of the Hindoos, unless the theory of natural law had given it a type of excellence different from the usual one." [2]

In order, then, to show that the Romans did arrive at such a conception of private law, and in briefest to outline the process by which they did so, it is necessary in the first place to glance at the legal condition of things as it presents itself to us in the earliest period of Roman history. This period we may take as extending from the foundation of the Republic, or from the supposed date of the Twelve Tables, to the first quarter of the third century B. C., when Rome had completed the conquest of central and southern Italy, and before she had commenced the acquisition of those provinces which afterwards composed the Roman Empire.

Now, it is no doubt true that at the earliest moment when the light of history dawns upon the scene, the Romans showed in matters of law a condition in advance of that reached by other primitive people. One may point in illustration to the fact that the predominance of the state over the *gentes* or the clan-groups was apparently firmly established; that the institution of private ownership had been developed; that "the conventional language

[1] Some rules there will be which cannot be the result of any such juridical analysis, just as there are some actions which are neither moral nor immoral, but simply unmoral. Such is the rule of the road so far as the law takes cognizance of it; or our legal rule that a will must have two witnesses, and not one only or three. There are rules relating to matters which it is better to regulate one way or another, but in the regulation of which no juridical question, strictly speaking, arises.

[2] Maine, Ancient Law, 1905 ed., 68.

of symbols" had very largely disappeared, and given place in all transactions regulated by law to a direct expression of the will of the parties. But, on the other hand, we find a condition of things still very archaic and indicating little or no conception of the true nature of law. In the first place we see that the law was personal, not extending to all dwellers in Roman territory, but only applying to Roman citizens and to such outlanders as might belong to the favored communities to which by treaty the privileges of Roman private law had been more or less widely extended, or who might have had personal privilege extended to them in that respect. In the second place, we see all that important branch of private law which governs the family relations treated of in the most primitive way, all the members of the family being left under the despotic control of the head of the family, unable to enter into any private transactions, whether marriage or any other, in legally binding fashion, save under his direction, or as his representatives, and incapable of acquiring or owning property in their own right and on their own behalf.

Then, as to the methods of the law for the carrying through such transactions as the law did recognize, they were highly artificial as distinguished from natural, — as distinguished, that is, from those which people are likely to adopt if not interfered with by legal regulation. Thus, if the Roman citizen wished to contract a marriage in the methods then in vogue, he had to go through either an elaborate religious ceremony or else a secular ceremony modelled on a transaction of sale, for the carrying out of which the presence of five witnesses was required, and that of a functionary known as a scale-holder, who was in truth a survival of the days when, the medium of exchange being raw copper, a sale involved a weighing out of the required quantity. If he wanted to make a sale of a landed estate and the appurtenances, he had to go through a similar ceremony with the "copper and the scales"; while as to personal property generally, it is still a moot-point how soon law recognized at all absolute ownership in it, although when it did so, here at least the simple method of delivery by the vendor of the goods, accompanied by payment by the purchaser, with the intention of transferring the property, sufficed. So, too, if the Roman citizen wished to make or receive a legally binding loan of money, the inevitable copper and the scales had to be resorted to, followed by the barbarous remedy of personal bondage, permitted to the creditor against the debtor who was in

default, in the absence of any regulated system either of execution against property or of relief for insolvent debtors. Again, if the purpose was to make a will, either it had to be done by application to the legislative assembly — the *comitia curiata*, — resulting in something analogous to what we would call a private act, or else it had to take the form of a sale by the intending testator, with the copper and the scales and with five witnesses, of his estate to a friend, who on his decease would be ultimately required, under the provisions of the Twelve Tables, to recognize the appointed heir or heirs, against whom legatees and creditors could make their claims. But no recognition of testamentary trusts was given by the law, we are told, until the commencement of the Empire; nor were trusts *inter vivos*, which have so prominent a place in our own social and legal arrangements, ever, it would seem, recognized among the Romans. Again, if a citizen made no will and died intestate, the claims of affection and blood relationship were ruthlessly set aside as against all who did not come within the agnatic circle, from which were excluded all descendants in the female line, as well as any son or grandson who had been emancipated by the intestate from his paternal authority, and any daughter who had contracted marriage in either of the ways above referred to.

And besides the highly artificial and ceremonious methods alone recognized by the law, we see how restricted in number they were. The evidence tends to show that the law had no recognition of such transactions as the simple contract of sale, or of hire, or of deposit or pledge, and that in fact, with two exceptions of very limited application (namely, a formal contract whereby one might bind himself to provide a dowry for a daughter or granddaughter on her marriage, or to be responsible as a surety for the fulfilment by another of some undertaking), the only two juristic acts recognized by the law, in the early period, were the sale by *mancipatio* (the technical name of the transaction with the copper and the scales above mentioned) and the contract of loan known as the *nexum*, involving a like ceremony, and such applications of these methods to transactions to which they in their origin had no reference, — such as emancipation of children or of slaves, adoption, and the forms of marriage and will-making already referred to, — as the jurists were able ingeniously to devise. Especially we notice that there was no recognition by the law in any true sense of a contract of agency whereby one acting for another might render the latter liable to a third party without being liable himself,

a contract upon which so much of the business of modern life depends.

And again, in the case of such obligations as the law did lend binding force to, we read that the strictest interpretation, or what was called *strictum jus*, was applied. As a man had spoken, so was he held to be bound, and, so far as appears, there was but one form of contract in respect to the enforcement of which equitable considerations were admitted, namely, the method of giving security on property known as the *mancipatio cum fiducia.* And as regards legal procedure, the forms of action were few in number, involved the utmost technicality and ceremoniousness, and were conducted in the rigidly technical and narrow spirit which characterizes legal procedure of an archaic type.

And while such were what one may call the positive institutions of the law, there is also no indication of any recognition of the fact that private law in its true nature consists not so much of rules imposed from above, or by the tyranny of custom or of religion, as of rules deduced by the process of analysis and explication of human transactions and relations above referred to. Thus scarcely any instances seem forthcoming of the law recognizing implied obligations. One apparent exception may be pointed to in the warranty of quiet possession accompanying sale by the copper and the scales, but as to that the most approved view now would seem to be that it was not a case of implied warranty, but arose out of express words of the vendor. For the rest, a recognition by the law of the obligation of a guardian honestly to administer the estate of his wards would seem to be almost the only example of legal obligation arising out of a relation of this kind.

The last two centuries and a half of the Republic, especially the latter half of that period, unquestionably saw a notable development and expansion of the law at Rome. We see some deliberate recognition of the claims of equity and justice in modification of the immemorial rules of the *jus civile*, or, as we might say, the old common law. Perhaps the most notable example is what is known as the Publician Edict, wherein were recognized the equitable claims of a *bona fide* purchaser, even though there may have been technical defects in the conveyance to him of the property purchased, and — as against all but the true owner — even though his vendor had, in fact, no title to the property sold. The same tendency operating upon the old common law appears also at this

period in the just modification of the law of prescription, or *usucapio*, by requiring that one should have become possessor *bona fide*, and as the result of some legitimate transaction such as sale or gift, if time was to run in his favor and he was to acquire full legal ownership upon lapse of the necessary period.

We see, too, at this time recognition of the natural claims of blood relationship, in matters of succession to property, secured by the prætorian institution of *bonorum possessio*, whereby, although the prætor could not by his edict transfer the legal inheritance from the common law heir to another, yet he could and did put another, if entitled by nearness of blood relationship, into possession of the estate and protect him in that possession until by length of time legal ownership had accrued to him, in defiance of many of the rigid and narrow rules of agnatic succession. So, too, we see another use of this *bonorum possessio* in the simplification of the law of wills by the establishment of the prætorian will, which required only the presence of seven seals, and did not require evidence of the actual carrying out of the ceremony of the copper and the scales; although this prætorian will did not apparently acquire validity as against the *jus civile* heir, if the latter could prove defects in the accompanying mancipatory ceremony, until an edict of Marcus Aurelius in the latter part of the second century of our era. It was towards the close of the Republic, also, that Roman law, in the words of Sohm, "contrived to accomplish a veritable masterpiece of juristic ingenuity in discovering the notion of a collective person; in clearly grasping, and distinguishing from its members, the collective whole as the ideal unity of the members bound together by the corporate condition; in raising the whole to the rank of a person (a juristic person, namely) and in securing it a place in private law as an independent subject of proprietary capacity standing on the same footing as other private persons."[1]

But in the main it seems evident that the legal expansion of Rome in this period is to be ascribed to the growth of a broader system of law, alongside of the old common law, which was applicable not only to Roman citizens, but to all free men at Rome. It seems agreed that this was in the main, in the first instance, a recognition by the prætors of existing mercantile customs and

[1] Sohm, Institutes (Ledlie's translation), 2 ed., 202.

methods, practically forced upon them by the increasing numbers of alien traders and residents at Rome, which followed the great expansion of commerce incident to the final defeat of Carthage and to the spread of Roman dominion over the countries subsequently constituting her Mediterranean provinces. These mercantile usages would inevitably be characterized by simplicity and by the ready recognition of common equity and justice, being the outgrowth of the ways which business men naturally adopt of doing business. The four contracts which became recognized during this period as legally obligatory upon the mere consent of the parties to them, contrary to all the traditions of the Roman law, — which regarded such mere consent, unaccompanied by any formal ceremony or fixed legal formulæ, as mere *nudum pactum*, — indicate on their face the probability that their recognition was the outcome of commercial necessities. They were the contracts of sale, letting and hire, partnership, and agency or mandate. The same may be said of the four contracts *re*, that is, accompanied by the delivery of something, which are believed to have first obtained legal recognition in this epoch, namely, the *mutuum*, or simple loan of money without any ceremony of the copper and the scales, the *commodatum*, or contract of gratuitous loan for use, the *depositum*, or contract of gratuitous deposit, and the contract of simple pledge by delivery over of property with that object.

To trade, also, it would seem probable that we may attribute the establishment of what is known as the literal contract, whereby entries in ledgers of receipts and disbursements, made with the consent of the party debited, were held to constitute binding obligations; and whereby by means of cross entries the advantages of negotiability were secured at a time before the invention of what we call negotiable instruments. Part of the advantages of this contract, moreover, lay in the fact that once formed it was *stricti juris*, or in other words the party liable was strictly held by it, and could not plead, as against its enforcement, equitable considerations existing before or arising after it.

On the other hand, all the other contracts above mentioned were what were called *bonæ fidei* contracts, or in other words their legal enforcement was permitted only subject to all proper considerations of justice and equity as between the parties. It is obvious what an opening this left for the legal recognition of implied obligations; as did also the principle of Roman law said

to have been recognized in this period that no one must be enriched at the cost of another's injury. This establishment of *bonæ fidei* actions marks a most important liberalization of the law, inasmuch as under the old *jus civile* it is believed that there was only one contract which was in this sense *bonæ fidei*, namely, the *mancipatio cum fiducia*.

The characteristics, then, of this new system of law that had grown up alongside of the old national common law at Rome, were greater naturalness and simplicity, and more recognition of justice and equity, as distinct from a spirit of rigid technicality, ceremoniousness, and artificiality; and we find indications of Roman lawyers arriving at a generalization in respect of such tendencies and characteristics in the fact that, apparently about the time of Cicero, a new word came into vogue to indicate this portion of the legal system, namely, "*jus gentium*," or, as we might say, "universal law," — a name which indicates the recognition of the fact that the distinguishing feature of this new law, available to all free men, was that it had a certain universal character, as contrasted with a local, tribal, narrowly national character.

But the important thing for our present purpose is to notice that in the main this development of law at Rome in a right and true direction was not the result of any scientific theory of what private law should be, but rather the outcome of circumstances, and of the absolute necessity of devising rules of law applicable to the transactions of trade and the affairs of the numerous transient or permanent non-citizen residents at Rome. The prætors' edict is evidence of the way in which the Roman magistrates met the necessities of the situation with the practical ability which characterized them; but law was still in its empirical stage, nor was the prætors' edict capable of fully meeting the necessities of legal development, any more than legislation by parliament would be in our own day. In order that the expansion and liberalization of the law should advance uniformly towards the building up of a perfect system, it was necessary that some theory, or ideal, as to the true nature of law in general, should establish itself, and this we shall now see was destined in the fullness of time to come to pass.

This ideal was found, apparently about the beginning of the Empire, in the Stoic conception of a law of nature, which the Roman jurists adopted in their speculations, and applied to matters legal in a way in which the Stoics themselves had never done. The contribution of the Stoics to legal studies "consisted more in

the informing spirit than in any definite conceptions which were borrowed." [1]

It is not necessary here to dilate at length upon the Stoic theory of a law of nature. At its basis was the belief that there is inherent in the universe at large, and in each individual thing, whether animate or inanimate, a certain nature, which, if allowed to take its proper course, would ultimately lead to the attainment of a perfect development of each thing in its own order. This nature, it was held, was essentially reasonable, its rules embodied the *naturalis ratio*, and reasoning beings could, by exercise of their reason, find out what its dictates were, and their duty was faithfully to follow them. And under this conception, as developed by the jurists, not only is there such a nature of man, of animals, and of every individual physical thing, — there is also " a nature of every sort of contract, action, and so on. In each and all of these 'natures' an ordinative energy and determinative rule are observable. These are its *naturalis ratio*." [2] In this conception as applied to law the Roman jurists found an ideal, toward the perfect realization of which in the actual law of the land they steadily pressed during the classical period of Roman law.

Now, the more we study this conception of a law of nature, as applied to the transactions and relations of mankind on the juridical plane, in the dry light of modern reason, the more we are likely to come round to the view of Professor Holland, that laws of nature, in this sense, are merely " such of the received precepts of morality relating to overt acts, and therefore capable of being enforced by a political authority, as either are enforced by such authority, or are supposed to be fit so to be enforced." [3] But if the Roman jurists had so regarded it, or spoken of it, it would assuredly never have borne the fruit it bore in the development of law. Their position was by no means merely that of superior persons criticizing the law of the land from the standpoint of their own higher morality. If that had been all, their labors would probably have been as ineffective as the criticisms of superior persons are very apt to be. On the contrary, the jurists attributed, or pretended to attribute, an objective existence and reality to their law of nature. They looked upon it as a veritable *lex*, whose rules were discoverable by reason, and when discovered had an inherent

[1] W. W. Capes, Stoicism, 239–240.

[2] Muirhead, Private Law of Rome, 2 ed., 382.

[3] Holland, Jurisprudence, 10 ed., 30.

authoritative force, and were in fact the truest and highest law.[1] And if such a view of the law of nature was indeed a misconception, we may at least say that it was the most beneficent misconception which ever occupied the human mind, whether we regard its effect on the development of law, or the functions it discharged during the middle ages and as the basis of modern international law.

Moreover, it is to be observed that the semi-official position of the Roman certificated jurists, and the *jus respondendi* which they possessed, and the authoritative force of their legal opinions when produced before the *judices* to whom lawsuits were remitted by the prætor, enabled them in large measure to secure the embodiment of their views in the actual law of the land. As it has been concisely expressed, the bar gave the law to the bench at Rome, not the bench to the bar, as with us. The only objection to the phrase is that, strictly speaking, there was no bar and no bench.

The really important thing to notice, however, is that the principles of the law of nature as deduced by the Roman jurists, and the methods of its development in their hands, were entirely in accordance with the true conception of private law as above outlined. "The conception of nature as a source of law," says Mr. Bryce, "found a solid basis for law in the reason and needs of mankind, and it softened the transition from the old to the new, first by developing the inner meaning of the old rules while rejecting their form, extracting the kernel of reason from the nut of tradition, and secondly, by appealing to the common sense and general usage of mankind, embodied in the *jus gentium*, as evidence that nature and utility were really one, the first being the source of human reason, and the latter supplying the ground on which reason worked."[2] And again, says the same writer, "Speaking broadly, the law of nature represented to the Romans that which

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[1] Mr. Bryce, however, evidently thinks the Roman jurists knew very well the true state of the case. "A modern precisian," he says, "might say that the Romans ought to have called it, not 'the law of nature,' but 'materials supplied by nature for the creation of a law,' a basis for law rather than the law itself. To the Romans, however, such a criticism would probably have seemed trivial. They would, had the distinction been propounded to them, have replied that they knew what the critic meant, and had perceived it already; but that they were concerned with things, not words, and having a practical end in view, were not careful about logical or grammatical minutiæ." 2 Bryce, Essays on History and Jurisprudence, 152–153.

[2] 2 Bryce, *ibid.*, 156.

is conformable to reason, to the best side of human nature, to an elevated morality, to practical good sense, to general convenience. It is simple and rational, as opposed to that which is artificial or arbitrary. It is universal, as opposed to that which is local or national. . . . It is natural, not so much in the sense of belonging to men in their primitive and uncultured condition, but rather as corresponding to and regulating their fullest and most perfect social development in communities, where they have ripened through the teachings of reason." [1]

The characteristics of the speculative Roman *jus naturale*, as Voigt summarizes them, are its potential universal applicability to all men, among all people, and in all ages, and its correspondence with the innate conviction of right; and its leading propositions, the recognition of the claims of blood, the duty of faithfulness to engagements, the apportionment of advantage and disadvantage, gain and loss, according to the standard of equity, and the supremacy of the *voluntatis ratio* over words or forms.[2]

But directly private law was conceived of as a system to be developed by a process of reasoning working upon fundamental principles of justice and common sense, and not consisting merely of ancient customs and ceremonies, or of rules arbitrarily imposed by authority, a true conception of law had been reached. Herein lay what was indisputably true in the conception of a *lex naturæ*. To conceive of law in this way was the actual achievement of Rome, and when once this idea of law had been attained it was an inestimable addition to the thought of mankind. Many a chapter, little creditable to the history of English law, would have been non-existent if such a conception had at all times possessed the minds of judges and of legislators. Until English law had been delivered from the technicalities and artificial logic with which lawyers surrounded the feudal land law, on the one hand, and from the methods of legal administration known as forms of action on the other, it was impossible for it to be placed upon the basis, and developed along the lines on which law had been placed, and which law had attained, in the classical period of Roman jurisprudence. Now, however, if we study the development of our case law, it is clear that a process of development is going on largely, if not altogether, in harmony with the true conception of private

[1] 2 Bryce, Essays on History and Jurisprudence, 151–152.

[2] Das Jus Naturale, 304, 321–323; cited in Muirhead, Private Law of Rome, 2 ed., 381–382.

law as above unfolded. We have at last attained to the position to which the Roman jurists led the way.

Thus we are able to understand the true meaning of a passage in one of Sir Henry Maine's essays which must have puzzled many a student. In his essay on Roman Law and Legal Education, he says: "It is not because our own jurisprudence and that of Rome were *once* alike that they ought to be studied together; it is because they *will be* alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity; and because we in England are slowly, and perhaps unconsciously and unwillingly, but still steadily and certainly, accustoming ourselves to the same modes of legal thought, and to the same conceptions of legal principle, to which the Roman jurisconsults had attained after centuries of accumulated experience and unwearied cultivation." [1]

The same idea is to be found expressed in clear and striking language by Sir Frederic Harrison in his articles on the English School of Jurisprudence, published a good many years ago in the *Fortnightly Review*. "The present generation," he says, "has witnessed a really striking phenomenon. This is no less than the re-annexation of the English law on to the great body of principle, of which the Roman law is the basis and the framework. Henceforward the insularity of English law is a thing of the past. . . . English law has worked itself free from whole masses of those feudal anomalies and accidents which in the last century made it seem something so monstrous and hopeless to men trained in the civil law. It never was at any time in so unmethodical a state as was the law of France before the Code of Napoleon, or the Roman law in the time of Cicero. But now that much of the old confusion has been cut away, it is seen that the bulk of the English law is entirely comparable to, and in many respects in complete harmony with, the bulk of the civil law. The law relating to land, to buildings, and to the settlement of estates, and necessarily the law of succession and wills, is from political causes deeply stamped with the history of its feudal origin. It is this startling and picturesque side of English law which has filled the lawyers of England and of the Continent alike with the conviction that English law is a unique production of the human mind. But this is merely the

[1] Cambridge Essays for 1856, printed as an appendix to Village Communities in the East and West, 332.

historical casing of our law. Behind this feudal accident, when we study it by a sound analysis, it is seen the bulk of the English law, the whole law of contract, the whole commercial law (and this is ever becoming more and more the bulk of the civil law), really, as the old books said, 'runs on all fours' with that modified and modernized form of the law of Justinian which is the groundwork of the law of all civilized Europe."[1]

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[1] 31 Fortnightly Review 129.